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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL GEORGIE CARSON,

Defendant-Appellee.
_____/

Supreme Court No. 166923

Court of Appeals No. 355925

Emmet Circuit Court No. 20-005054-FC

REPLY TO DEFENDANT/APPELLANT'S ANSWER TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL PEOPLE OF THE STATE OF MICHIGAN

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

Michael H. Schuitema (P72718)
Emmet County Prosecutor

Christopher M. Allen (P75329)
Assistant Solicitor General

Brent E. Morton (P58526)
Assistant Attorney General
Attorney for Plaintiff-Appellant
Criminal Appellate and
Parole Appeals Division
PO Box 30217
Lansing, Michigan 48909
(517) 335-7650

Dated: May 28, 2024

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INTRODUCTION

The Court of Appeals' majority decision creates and applies a novel approach to the particularity requirement for search warrants. One that conflicts with this Court's decision in *People v Hughes*, 506 Mich 512 (2020), is wrong both in application of the new requirement and the refusal to apply the good faith exception to the exclusionary rule, and it will cause material injustice by excluding reliable evidence of criminal activity despite the reliance of law enforcement on the approval of the search warrant by a neutral arbiter. This Court's review is warranted. See MCR 7.301(B)(2), (3), (5).

For the benefit of the lower courts, the legal community, law enforcement, and the general public, this Court should grant leave to appeal and define the limitations of the Fourth Amendment's particularity requirement.

REBUTTAL ARGUMENT

I. Carson's answer fails to address the fact that the lower court has established a new rule of law substantially changing the standard for obtaining a search warrant for a cell phone.

In preparing his answer, Carson overlooks the fact that the application is not directed toward an error correcting court, but instead a request for review of an issue by our highest Court. Rather than discuss "whether the issues presented are of significant public interest, whether the cause involves legal principles of major significance to the State's jurisprudence, and whether the decision below is in probable conflict with the high court's precedent," MCR 7.305(B)(2), (3), (5), *Halbert v Michigan*, 545 US 605, 605 (2005), Carson focuses on the language of a search

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warrant affidavit that the Court of Appeals did not consider when making its decision. As a result, Carson's answer should not deter this Court from addressing the Court of Appeal's new application of the Fourth Amendments particularity requirement. US Const, Am IV.

A. Carson's reliance on the affidavit and federal case law demonstrates the novelty of the opinion.

Rather than address the merits of the *Carson* majority's opinion and its creation of lower-court-binding precedence regarding cell-phone search warrants, Carson conducts an analysis of the search warrant affidavit. (Def's Answer Br, pp 4–6, 10.) This is information that the *Carson* majority specifically did not consider in striking down the validity of the cell-phone search warrant. *People v Carson*, __ Mich App __, __ (2024), slip op at 11 n 7 ("we have *not* considered the contents of the supporting affidavit") (emphasis in original).

Further, Carson asserts in his answer that the majority "did nothing more than faithfully apply [the] well-established principle" of the particularity requirement "that a search of digital cell-phone data pursuant to a warrant must be reasonably directed at obtaining evidence relevant to the criminal activity in that warrant." (Def's Answer Br, p 9.) Quoting *Hughes*, 506 Mich at 516. Yet this assertion is made without the support of additional binding Michigan Supreme Court decisions. Rather, aside from referencing this Court's decision in *Hughes*, the response relies nearly exclusively on non-binding federal court decisions from the Sixth Circuit. (Def's Answer Br, pp 6–7, 9.) While such decisions *may* be considered

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by Michigan courts for their persuasive value, such reliance demonstrates the novelty of the majority's opinion. See *Abela v Gen Motors Corp*, 469 Mich 603, 607 (2004) (federal appellate decisions provide only persuasive authority and are not binding on this Court).

Due to the lack of binding authority on this subject coupled with lack of specific direction for compliance in the majority decision, the courts, practitioners, and law enforcement are left to guess at how to craft acceptable search warrants for cell phones. Only this Court can clarify how to comply with the Fourth Amendment's particularity requirement. This Court's review is necessary.

B. Carson's reliance on *Hughes* overlooks the fact that the majority's application of the case is incorrect.

While Carson asserts that the majority faithfully applied *Hughes*, this reliance is misplaced because as discussed in the application, the majority did not properly apply *Hughes'* recognition that a warrant is sufficiently particular if the scope of the search is limited by the crimes being investigated. (Def's Answer Br, p 9; Application Br, pp 12–21.)

1. *Hughes* recognized that the scope of the search was sufficiently limited by the crime being investigated.

This Court in *Hughes* did not find error with the search of the cell phone, but instead found a particularity violation when law enforcement conducted a second search of the data for evidence of a different crime than that discussed in the affidavit establishing probable cause for the initial search. *Hughes*, 506 Mich at

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516–518, 529, 536–540. Significantly, *Hughes* found no constitutional violation when the detective extracted data from the phone, producing a 600-page report, which was reviewed for evidence of Hughes' drug trafficking activity. *Id*. at 520–521, 540–541. This was despite the warrant being based on broad search language that included,

> *[A]ny records pertaining to the receipt, possession and sale or distribution of controlled substances including but not limited to documents, video tapes, computer disks, computer hard drives, and computer peripherals*; other mail receipts, containers or wrappers; currency, property obtained through illegal activity, financial instruments, safety deposit box keys, money order receipts, bank statements and related records. [*Hughes*, 506 Mich at 520 (emphasis in original)]

As part of this analysis, the *Hughes* Court recognized that while conducting a search, an investigator will "have to review some data that is unrelated to the criminal activity alleged in the authorizing warrant." *Id*. at 547. A concept ignored by the Court of Appeals majority. *Carson*, __ Mich App at slip op 12.

2. The data extraction is a permissible seizure, not an impermissible search of the entire cell phone.

While Carson characterizes the cell-phone data extraction as a "dump" and an impermissible search violative of the particularity requirement, this Court in *Hughes* distinguished between the extraction of data and the subsequent "review of the seized data." (Def's Reply Br, pp 8–9.) *Hughes*, 506 Mich at 547–548. Carson's claim that the data download conducted in this case was an impermissible search misunderstands the concept established in *Hughes* that the preservation of cell-phone data is a permissible seizure not limited by the authorizing warrant.

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Hughes, 506 Mich at 547–548. While any subsequent review of the extracted data is a search subject to the warrant's boundaries. *Id*.

3. *Hughes* does not advocate limiting the search of a cell phone to specific items or applications.

While Carson and the majority assert that the warrant was obviously defective due to the broad language and broad search authorization, the language in the warrant is consistent with *Hughes*' language which similarly was only limited in scope by the crime being investigated. *Id*. at 520; *Carson*, __ Mich App at slip op 12–14. (Def' Answer Br, p 9.) This is because the limitation of the scope of the search to the crime being investigated was more than a mere "guardrail," but instead was sufficiently particular for *Hughes*. Carson, __ Mich App at slip op 12.

In contrast to the majority opinion, the dissenting opinion that the cell-phone search was sufficiently limited "to the investigation of Larceny in a Building and Safe Breaking," faithfully applies this Court's decision from *Hughes*. *Carson*, __ Mich App at __ (Redford, J., dissenting); slip op at 8–11.

While *Hughes* does indicate that a search may be limited in scope by limiting the manner and procedure of the search, including the items in the cell phone to be searched, the majority opinion fails to "faithfully apply" *Hughes* because it fails to analyze the affidavit as part of a totality-of-circumstance analysis to see if the search procedure actually exceeded the scope of the warrant. *Hughes*, 506 Mich at 546–547. Considering that the *Carson* majority chose to exclude the very evidence it believed there was probable cause to obtain and said was "wholly appropriate to issue a warrant" to search for such correspondence preserved on the cell phone, the

majority's failure to look at the totality-of-the circumstances is significant. *Carson*, __ Mich App at slip op 12.[1]

Additionally, the *Hughes* Court explained that seizure of data without a warrant was reasonable, while a review of that data was only reasonable if authorized by a warrant and limited in scope. *Hughes*, 506 Mich at 530. Unlike the *Carson* majority, the *Hughes* Court did not require limiting the search of the cell phone data based on the type of data searched or the application that accessed that data, rather Hughes' constitutional rights were sufficiently protected by a limitation in the *scope* of the review of the extracted data. *Id*. at 530–531.

C. This Court should grant the People's application.

Contrary to Carson's claim, the *Carson* majority has created new jurisprudence limitations for cell-phone search warrants. The type of jurisprudence that has significant impact on the public involving legal principles of major significance. MCR 7.305(B)(2), (3). Further, it is an application of binding precedence that is not only wrong but conflicts with the earlier decision of this Court in *Hughes*. MCR 7.305(5)(a), (b).

Due to the novelty and importance of the *Carson* majority's new law, this Court should grant the People's application to consider the propriety of this new search warrant limitation and clarify how law enforcement may pursue evidence of criminal activity while respecting individual constitutional rights.

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[1] "What the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Terry v Ohio*, 392 US 1, 9 (1968) (cleaned up).

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II. Carson's lack of analysis should not persuade the Court to deny the application.

Carson's answer supporting the majority's refusal to apply the good faith exception is unpersuasive for two reasons.

First, like his argument that the *Carson* majority merely applied established case law, Carson inappropriately relies on the language of the search warrant affidavit to justify denial of the application of the good faith exception, when the Carson majority specifically decided not to consider the language in making its decision. (Def's Answer Br, p 10.) *Carson* __ Mich App at slip op 11 n 7.

Second, the answer relies on the same circular logic as the *Carson* majority, that because the warrant was "facially invalid," the good faith exception does not apply. (Def's Answer Br, p 10.) *Carson*, __ Mich App at slip op 14. But this reliance misapprehends the need to properly analyze whether the good faith exception applies with a consideration of the conduct of law enforcement and the reliability of the evidence obtained because of the search, particularly where the law appeared to be clear in favor of the actions taken here. (App Br, pp 22–27.)

In particular, law enforcement took appropriate steps to preserve evidence by seizing the cell-phone at the time of arrest and conducting an extraction of data to preserve it, while respecting Carson's rights by waiting to search the cell-phone data until a neutral judge approved a search warrant. (7/7/2020 Tr Mot to Suppress, pp 8, 11–12; 7/15/2020 Op & Order, p 2.) *Hughes*, 506 Mich at 547–548. Then upon a search approved by a neutral judge, law enforcement found text messages which the majority specifically recognizes was reliable and discoverable

under a search which the majority would have endorsed. *Carson*, __ Mich App at slip op 12.

Yet, despite the proper conduct of law enforcement, the approval of the warrant language by the judiciary, the reasonableness of the discovery of the messages, and the reliability of the evidence – without analysis – the majority decrees that such exception does not apply. *Id*. at 14. This conclusion is not based on reasoned analysis and should not guide the future of Michigan jurisprudence. Rather, this Court must consider the issue and provide a definitive and reasoned analysis that may be reproduced by Michigan courts so that the good faith exception remains valid and is applied consistently across the state.

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CONCLUSION AND RELIEF REQUESTED

For the reasons contained in the People's application and this reply, the Court should grant the application, clarify the proper approach to comply with the particularity requirement, and reverse the majority decision of the Court of Appeals.

Respectfully submitted,

Dana Nessel
Attorney General

Ann M. Sherman (P67762)
Solicitor General
Counsel of Record

Michael H. Schuitema (P72718)
Emmet County Prosecutor

Christopher M. Allen (P75329)
Assistant Solicitor General

Brent E. Morton (P58526)
Assistant Attorney General
Attorney for Plaintiff-Appellant
Criminal Appellate and
Parole Appeals Division
PO Box 30217
Lansing, Michigan 48909
(517) 335-7650

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Brent E. Morton (P58526)
Assistant Attorney General
Attorney for Plaintiff-Appellant
Criminal Appellate and
Parole Appeals Division
PO Box 30217
Lansing, Michigan 48909
(517) 335-7650